



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 13, 2005

Mr. Ronny H. Wall
Associate General Counsel
Texas Tech University System
P.O. Box 42021
Lubbock, Texas 79409-2021

OR2005-04168

Dear Mr. Wall:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 223034.

Texas Tech University (the "university") received a request for the following: (1) the proposal to the Department of Defense, in its entirety, in which the project Combinative Toxicity Studies of Biotoxin Mixtures (the "project") was proposed; (2) all chemical and/or biological safety protocols related to that study; (3) the minutes of all committees with charges related to chemical and/or biological safety when such committees met to consider matters related to the project; and (4) the list of project titles and principal investigators in all projects that are or have been part of the Admiral Zumwalt program, from its inception through the present. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the Department of the Army's Research, Development and Engineering Command (the "RDECOM"). See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, you state that, in order to receive funding to conduct the project, the university signed an agreement with RDECOM to keep all information concerning the project confidential. It is well-settled that the Act prevents a governmental body from promising to keep information confidential unless it is statutorily authorized to do so. See Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986). Furthermore, information that is subject to the Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976). In other words, a governmental body cannot, through an

agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); *see also* Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, the submitted information may not be withheld unless it falls within an exception to disclosure under the Act.

Both the university and RDECOM contend that the requested information is excepted from disclosure under section 552.101 in conjunction with federal law. Specifically, RDECOM claims that portions of the submitted information are excepted from disclosure under section 2305(g) of title 10 of the United States Code in conjunction with the federal Freedom of Information Act (“FOIA”), section 552(b)(3) of title 5 of the United States Code. Section 2305(g) states in pertinent part:

[A] proposal in the possession of [RDECOM] may not be made available to any person under [FOIA].

10 U.S.C. § 2305(g). Additionally, the university indicates that section 552(b)(1) of FOIA may be applicable, and RDECOM indicates that section 552(b)(6) may be applicable. In Open Records Decision No. 561 (1990) we noted the general rule that FOIA applies only to federal agencies and does not apply to records held by state agencies. *See* Open Records Decision No. 561 at 6 (1990); *see also* Attorney General Opinion MW-95 (1979) (concluding that neither FOIA nor the federal Privacy Act of 1974 applies to records held by state or local governmental bodies in Texas); Open Records Decision No. 124 (1976) (concluding fact that information held by federal agency is excepted by FOIA does not necessarily mean that same information is excepted under the Act when held by Texas governmental body). Accordingly, we conclude that FOIA does not apply to the requested information.

In addition to its arguments under FOIA, the university claims that the submitted information is excepted from disclosure pursuant to the Arms Export Control Act, 22 U.S.C § 2778. The Arms Export Control Act authorizes the President of the United States “to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services.” *See* 22 U.S.C § 2778(a)(1). You state that, because RDECOM retains control over the project, and the toxins used in the project are biological agents, “it appears that the requested information would be covered by the Arms Export Control Act.” After reviewing the statutory language, we conclude that this provision relates to general information regarding the control of arms exports and imports, and does not make information expressly confidential. *See* Open Records Decision Nos. 478 at 2 (1987) (stating that as a general rule, statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public), 658 at 4 (1998) (stating that statutory confidentiality provision must be express, and a confidentiality requirement will not be implied from the statutory structure). Consequently, the university may not withhold the

requested information pursuant to section 552.101 in conjunction with section 2778 of title 22 of the United States Code.

You also claim that the submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with section 130 of title 10 of the United States Code, which provides in part:

a) Notwithstanding any other provision of law, the Secretary of Defense may withhold from public disclosure any technical data with military or space application in the possession of, or under the control of, the Department of Defense, if such data may not be exported lawfully outside the United States without an approval, authorization, or license under the Export Administration Act of 1979. . . or the Arms Export Control Act[.]

...

c) In this section, the term 'technical data with military or space application' means any blueprints, drawings, plans, instructions, computer software and documentation, or other technical information that can be used, or be adapted for use, to design, engineer, produce, manufacture, operate, repair, overhaul, or reproduce any military or space equipment or technology concerning such equipment.

10 U.S.C. § 130. You state that the requested information involves toxicity studies of bio-toxin mixtures. You further argue that the requested information "would be exceptionally useful in military and commercial/law enforcement applications to establish detection parameters for future and more sophisticated biological agent detection devices[,]" and that "this information indicates a gap or vulnerability with our present detection systems and it potentially provides information that would be of significant value to those seeking to do harm to the United States." We note that the requested information consists of several versions of the university's proposal to RDECOM to conduct the project, information pertaining to a university committee's notification of use of hazardous chemical or biological agents to a university department, information related to the use of animals in the project, and a list of other projects that the university has either undertaken in the past or is currently undertaking as a contractor to the federal government. We note, however, RDECOM has not explained that this information consists of any technical data with military or space application. Thus, section 130 of title 10 of the United States Code is not applicable to the submitted information, and none of it may be withheld under section 552.101 pursuant to this federal provision.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. Gov't Code § 552.101. You contend that information that you have marked in Exhibit J is confidential pursuant to section 51.914 of the Education Code, which provides in pertinent part:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under Chapter 552, Government Code, or otherwise:

(1) all information relating to a product, device, or process, the application or use of such a product, device, or process, and all technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee[.]

(2) any information relating to a product, device, or process, the application or use of such product, device, or process, and any technological and scientific information (including computer programs) that is the proprietary information of a person, partnership, corporation, or federal agency that has been disclosed to an institution of higher education solely for the purposes of a written research contract or grant that contains a provision prohibiting the institution of higher education from disclosing such proprietary information to third persons or parties[.]

Educ. Code § 51.914(1), (2). The purpose of section 51.914(1) is to protect the “actual or potential value” of technological and scientific information developed in whole or in part at a state institution of higher education. *See* Open Records Decision No. 497 at 6 (1988) (interpreting statutory predecessor to section 51.914). Whether particular scientific information has such a potential is a question of fact that this office is unable to resolve in the opinion process. *See* Open Records Decision No. 651 (1997). Thus, this office has stated that in considering whether requested information has “a potential for being sold, traded, or licensed for a fee,” we will rely on a governmental body’s representation that the information has this potential. *See id.*

In this case, you represent that the information in Exhibit J directly reveals the substance of a research study regarding the development of improved bio-toxin detection devices and the improvement of medical treatment of persons exposed to bio-toxins. You further advise that the information gained from this study has the potential to be sold, traded, or licensed for a fee. Based on your representations and our review, we agree that some of the information in Exhibit J, which we have marked, reveals the substance of the research at issue and is therefore confidential under section 51.914 of the Education Code and excepted under section 552.101.¹ We note, however, that the remaining information in Exhibit J contains only general background material and other information tangential to the proposed research.

¹ As our ruling is dispositive, we need not address your remaining arguments against disclosure regarding this information.

You have not explained, nor can we discern, how the release of this information would reveal the details of the research at issue. *See* Open Records Decision Nos. 557(1990) (stating that working titles of experiments are not per se protected by section 51.914 because release would not permit person to appropriate research nor does information directly reveal substance of proposed research); 497 (1988) (stating that information related to research is not protected if it does not reveal details about research). Accordingly, the university may not withhold this information under section 552.101 in conjunction with section 51.914.

You also contend that portions of the remaining submitted information are excepted under section 552.101 in conjunction with sections 418.177, 418.178, and 418.180 of the Government Code. As part of the Texas Homeland Security Act, sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential. Section 418.177 provides:

Information is confidential if the information:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Section 418.178 provides:

- (a) In this section, "explosive weapon" has the meaning assigned by Section 46.01, Penal Code.
- (b) Information is confidential if it is information collected, assembled, or maintained by or for a governmental entity and:
 - (1) is more than likely to assist in the construction or assembly of an explosive weapon or a chemical, biological, radiological, or nuclear weapon of mass destruction; or
 - (2) indicates the specific location of:
 - (A) a chemical, biological agent, toxin, or radioactive material that is more than likely to be used in the construction or assembly of such a weapon; or
 - (B) unpublished information relating to a potential vaccine or to a device that detects biological agents or toxins.

Section 418.180 provides:

Information, other than financial information, in the possession of a governmental entity is confidential if the information:

- (1) is part of a report to an agency of the United States;
- (2) relates to an act of terrorism or related criminal activity; and
- (3) is specifically required to be kept confidential:
 - (A) under Section 552.101 because of a federal statute or regulation;
 - (B) to participate in a state-federal information sharing agreement; or
 - (C) to obtain federal funding.

Gov't Code §§ 418.177, .178, .180. The fact that information may relate to biological toxins or a governmental body's security concerns or measures does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The information at issue in Exhibit J consists of portions of the project abstract and project description contained in the university's proposal to RDECOM to conduct the project. The information at issue in Exhibit K consists of a list of other projects that the university has either undertaken in the past or is currently undertaking as a contractor to the federal government. You state that this remaining requested information relates to the project at issue and the other listed projects, all of which are designed to improve the government's ability to prevent, detect and treat bio-toxins. However, upon review of all of the information at issue and your arguments, we conclude that the information at issue neither constitutes nor reveals the contents of a vulnerability assessment. *See id.* § 418.177(2). You also state that the remaining requested information contains references to bio-toxins and descriptions of procedures "that more than likely would assist someone in constructing a biological weapon of mass destruction" and that the information identifies the location of the lab in which the project is conducted. However, you have not adequately demonstrated, nor is it evident from the information itself, that it would assist in the construction or assembly of an explosive weapon or a weapon of mass destruction, or that it indicates the specific location of material that would likely be used in such a weapon or to the location of information relating to a potential vaccine or to a device that detects biological agents or

toxins. *See id.* § 418.178(b)(1), (b)(2)(A), (B). You also state that the remaining requested information “was reported to RDECOM . . . [and] is related to terrorism detection and prevention.” We find, however, that, a proposal to conduct a research project is not a report relating to an act of terrorism as contemplated by section 418.180. *See id.* § 418.180. Therefore, we find you have failed to adequately explain how any of the information falls within the scope of section 417.177, 418.178, or 418.180 of the Government Code. We therefore determine that the university may not withhold any of the information at issue under section 552.101 in conjunction with any of the provisions of the Texas Homeland Security Act.

You also raise section 552.101 in conjunction with the doctrines of common law and constitutional privacy for information pertaining to the researchers. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the “zones of privacy” concerning marriage, procreation, contraception, family relationships, and child rearing and education that the United States Supreme Court has recognized. *See Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); Open Records Decision No. 455 at 3-7 (1987). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); Open Records Decision No. 455 at 6-7 (1987). This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. *See* Open Records Decision No. 455 at 7 (1987). Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy protects the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information are also private under section 552.101. *See* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

You have marked references to the date of birth, place of birth and the languages spoken by a university researcher in Exhibit J that you assert are excepted from disclosure under section 552.101 in conjunction with constitutional or common-law privacy. Upon review

of this information, we find that none of the information at issue is highly intimate or embarrassing. *See* Open Records Decision Nos. 542 at 5 (1990) (information regarding public employee's qualifications is of legitimate concern to public), 455 at 7 (1987) (birth dates, names, and addresses of character references are not protected by privacy), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). We further find that the information at issue does not fall within the zones of privacy or implicate an individual's privacy interests for purposes of constitutional privacy. *See* Attorney General Opinion MW-283 (1980). Accordingly, we conclude that the university may not withhold any of the information at issue under section 552.101 in conjunction with constitutional or common-law privacy.

You argue that section 552.108 is applicable to the remaining submitted information in Exhibits J and K. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You acknowledge that the university is not a law enforcement agency. However, you state that RDECOM does have law enforcement authority and, thus, the information is excepted under section 552.108 because release of the remaining information would undermine RDECOM's ability to detect illegal bio-toxin releases. We note that RDECOM has not asserted that section 552.108 is applicable to any of the remaining submitted information, nor has RCECOM otherwise asserted any law enforcement interests in the information. Therefore, the university may not withhold the submitted information under section 552.108.

Finally, you claim that section 552.117 is applicable to portions of the submitted information, which you have highlighted in blue. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the university may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the university must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The university may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

Notwithstanding an election by the employee at issue to keep his personal information confidential, his social security number may be confidential under section 552.101 in conjunction with federal law. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I). We have no basis for concluding that the social security number at issue is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the university pursuant to any provision of law enacted on or after October 1, 1990.

In summary, the university may withhold the information we have marked under section 552.101 in conjunction with section 51.914 of the Education Code. Pursuant to section 552.117(a)(1) of the Government Code, the university must withhold the information it has highlighted in blue if the employees at issue timely elected under section 552.024 to keep that information confidential. Notwithstanding the applicability of section 552.117, the social security number at issue may be confidential under federal law. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll

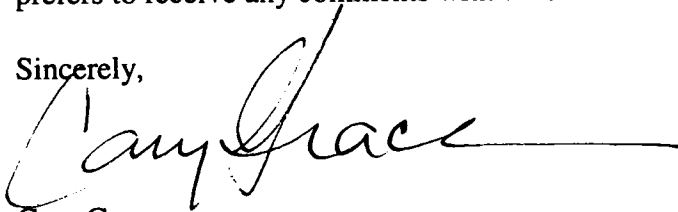
free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cary Grace", with a long horizontal line extending to the right.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 223034

Enc. Submitted documents

c: Mr. Edward Hammond
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(w/o enclosures)